86 1661

No.

Supreme Court, U.S.
FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

BATTLES FARM COMPANY, et al.,

Petitioners,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States is immune from liability for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), when the government opposes two related claims by taking a substantially justified position as to one of the claims, but a substantially unjustified position as to the other, resulting in significant liability on the merits.

2. Whether the standards set forth in Hensley v. Eckerhart, 461 U.S. 424 (1983), govern the calculation of fees under the Equal Access to Justice Act.

3. Whether a district court award of attorney's fees under the Equal Access to Justice Act is subject to de novo review by the court of appeals to the extent that that court is free to overturn the award on a theory of "substantial justification" that the government itself never advanced.

4. Whether the award of fees under the Equal Access to Justice Act by the district court below should have been affirmed.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
RELATED CASES	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	27

TABLE OF AUTHORITIES

PAGE

CASES:

Cinciarelli v. Reagan,
729 F.2d 801 (D.C. Cir. 1984).. 25

Cornella v. Schweiker,
741 F.2d 170 (8th Cir. 1984)... 25

Dubose v. Pierce,
761 F.2d 913 (2d Cir. 1985),
petition for certiorari
pending, No. 85-516..... passim

Goldhaber v. Foley,
698 F.2d 193 (3d Cir. 1983)..13,15,18

Hensley v. Eckerhart,
461 U.S. 424 (1983)..... passim

Spencer v. NLRB,
712 F.2d 539
(D.C. Cir. 1983).....17,18,24

Underwood v. Pierce,
761 F.2d 1342 (9th Cir. 1985),
modified, 802 F.2d 1107 (9th
Cir. 1986), petition for
certiorari pending,
No. 86-1512.....passim

PAGE

STATUTES:

National Housing Act of 1968,
12 U.S.C. § 1715z-1..... 4

28 U.S.C. § 1254(1)..... 3

Equal Access to Justice Act,
28 U.S.C. § 2412(d)..... passim

Civil Rights Attorney's Fee
Awards Act of 1976,
42 U.S.C. § 1988..... 21

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Battles Farm Company et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia

Circuit entered in this case on December 12, 1986.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 806 F.2d 1098. The opinion of the district court (App. 15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1986. A timely petition for rehearing was denied on March 3, 1987 together with a suggestion for rehearing en banc. (App. 47a, 48a). Chief Judge

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1. The following parties appeared in the proceedings below: plaintiffs Battles Farm Company, Bay Village Company, Cummins Tower Company, and Southfield Gardens Company, each of which is a Massachusetts limited partnership; and defendant Samuel R. Pierce, Jr., Secretary of Housing and Urban Development.

Wald, Judge Mikva, and Judge Robinson dissented (App. 50a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

> "(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

RELATED CASES

This case is related to two other cases in which petitions for a writ of certiorari are pending before the Court: Dubose v. Pierce, 761 F.2d

913 (2d Cir. 1985), petition for certiorari pending, No. 85-516 ("Dubose"); and Underwood v. Pierce, 761 F.2d 1342 (9th Cir. 1985), modified, 802 F.2d 1107 (9th Cir. 1986), petition for certiorari pending, No. 86-1512 ("Underwood").

STATEMENT

1. The petitioners (the "Battles Farm projects") are the owners of four lower-income housing projects built pursuant to Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1. They brought suit against the Secretary of Housing and Urban Development ("HUD") for failure to implement an "operating subsidy" program enacted by Congress to assist Section 236 projects. Under the program, subsidies to cover increased operating

expenses could be paid from a self-replenishing fund called the "excess rental reserve fund." In addition, subsidies could be paid from monies appropriated by Congress to satisfy long-term subsidy contracts entered into by HUD in the exercise of so-called "contract authority."

HUD's refusal to implement the program led to numerous lawsuits, including Dubose, Underwood, and Battles Farm. See Petition for Writ of Certiorari at 3-5, Dubose v. Pierce, No. 85-516, for a more detailed discussion of the operating subsidy program and the litigation resulting from HUD's refusal to implement the program. By March 1976, when the Battles Farm projects filed suit, nine district court decisions had unanimously held that the

operating subsidy program was mandatory and that HUD was required to pay subsidies to eligible projects at least from the excess rental reserve fund.

2. Despite these adverse rulings, HUD continued to resist each suit as it was filed. In each case, the agency argued that it had discretion not to implement the program because (1) HUD could not make operating subsidy payments directly from the reserve fund without obligating contract authority and (2) HUD had discretion whether to use its contract authority for this purpose or for other subsidies.

In Battles Farm, the projects responded that it was mandatory for HUD to provide operating subsidies, and that these subsidies could be paid directly from the reserve fund without the

exercise of contract authority. Alternatively, they argued that HUD's refusal to exercise contract authority was an abuse of discretion. Prevailing on the first theory, but not on the second, the Battles Farm companies ultimately recovered over $1.1 million in subsidies. These subsidies assured the survival of projects that had been in default or on the brink of default as a result of mounting operating expenses.

3. The district court thereafter awarded the Battles Farm projects attorney's fees under the Equal Access to Justice Act ("EAJA"), which mandates the award of fees to small businesses that prevail in litigation against the United States, unless the government can show that "the position of the United States was substantially

justified . . . ." 28 U.S.C. § 2412(d)(1)(A). The court concluded, first, that HUD's position on "the central issue" in the litigation -- "whether HUD had discretion not to implement the operating subsidy program" -- lacked substantial justification "because (1) HUD's position had no reasonable basis, (2) was consistently rejected by the courts, and (3) was ultimately abandoned by HUD." App. at 21a. Then, applying the standards of Hensley v. Eckerhart, 461 U.S. 424 (1983), the court held that no deduction should be made for time spent on the unsuccessful contract argument, since that was a related claim that could not practically or properly be fractionated from the main issue. App. at 26a-27a.

The court of appeals, in an opinion by Judge Silberman, reversed. The court did not disturb the district court's conclusions that HUD's position on the central issue had been unreasonable, or that the contract argument was integrally related to the main claim on which plaintiffs prevailed. Instead, the court reasoned that since HUD properly defended against the contract claim, and "might well have jeopardized [its] position on [that] . . . claim had [it] conceded the rental reserve fund claim," its positions considered in their entirety were reasonable. App. at 11a.

HUD had not defended against the award of attorney's fees on this ground either in the district court or

in its briefs to the court of appeals.[2] On the contrary, HUD maintained that it had opposed all reserve fund claims despite nine adverse district court decisions simply because the issue had not been definitively resolved against the agency at the appellate level. See, e.g., Br. for the Appellant at 20-21, Battles Farm Co. v. Pierce, Nos. 85-5945, etc. (D.C. Cir.). At the same time, HUD viewed the contract claim as "an 'easily compartmentalized,' discrete claim." Id. at 28. Thus, HUD itself made clear that the contract claim had had no effect at all on its decision to defend against the reserve fund claim.

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2. Judge Silberman raised the issue for the first time at oral argument in a question posed to petitioners' counsel.

If HUD had asserted, in accordance with the court of appeals' supposition, that the agency had opposed the reserve fund claim for fear of jeopardizing the defense to the contract claim, the projects could and would have introduced contrary evidence. Apart from the inconsistent statements in the agency's own briefs, HUD had consistently rejected demands for the subsidy even before any party had asserted a long-term contract claim. Moreover, as the district court found (App. at 21a), the mandatory nature of the operating subsidy program had been the "central issue" in this litigation, not the projects' requests for subsidy contracts. Those requests had been a subsidiary aspect of the litigation.

REASONS FOR GRANTING THE WRIT

1. We concur with the Solicitor General that "[g]iven the enormous volume of EAJA litigation, . . . errors committed by the court of appeals are of considerable practical significance and warrant review by this Court, which has yet to consider a case involving the construction of [the] EAJA." Petition for a Writ of Certiorari at 8, Pierce v. Underwood, No. 86-1512 ("Underwood Petition"). Indeed, as we show below, no better illustration of the need for review exists than this case, certainly when coupled with Underwood and Dubose.

According to the court below, the government under the EAJA may properly resist a claim as to which its position is unjustified when that might

assist its defense on a related claim as to which its position is justified. This ruling conflicts with the Third Circuit's decision in Goldhaber v. Foley, 698 F.2d 193 (3d Cir. 1983); is manifestly at odds with the central objectives of the EAJA of discouraging and providing compensation for unreasonable behavior by the government; contravenes this Court's treatment of similar issues under related fee-shifting statutes, as set forth in Hensley v. Eckerhart, supra; and is calculated to cause great harm, since litigation frequently involves multiple claims or defenses and the holding below "may be relied on widely by government lawyers in the future." Statement of Chief Judge Wald, dissenting from denial of rehearing en banc (App. at 51a-52a).

Furthermore, Battles Farm, Underwood, and Dubose require reconciliation. Each of these cases was originally brought to vindicate the entitlement of Section 236 projects and their tenants to operating subsidies. (Battles Farm and Underwood actually were heard and decided together in the D.C. District Court. They also were heard together in the court below until Underwood was transferred to the Ninth Circuit for settlement purposes.) In each of the cases the district court then awarded the plaintiffs attorney's fees under the EAJA after concluding that HUD's position in the litigation had not been substantially justified.

Nonetheless, on appeal, the three circuit courts adopted divergent approaches, with one (the Underwood

court) affirming and the other two (the Battles Farm and Dubose courts) overturning the fee awards. What the Solicitor General has said in seeking certiorari in Underwood is equally true here: This conflict "illustrates the lower courts' general inability to develop clear guidelines to govern the resolution of EAJA disputes -- a conflict sharply exemplified here, where [different] courts of appeals have reached contrary conclusions on essentially identical facts." Underwood Petition at 9. This Court should resolve the conflict.

2. In Goldhaber v. Foley, 698 F.2d 193 (3d Cir. 1983), the Third Circuit held that the fact that the government reasonably defended against one claim does not immunize it from a

fee award under the EAJA if its position on another claim was not substantially justified. "We would find it incongruous," the court explained, "to deny fees to a prevailing party who identifies and defeats one unreasonable government position simply because the government has substantial justification for defending a second claim in the same action. If fees were denied to a prevailing party in such a circumstance, the purpose of the Act would be thwarted . . . ." Id. at 197.

Eschewing this approach, the D.C. Circuit has condoned the government's adoption of unreasonable positions at least so long as those positions somehow advance the government's cause in reasonably defending against related claims. As a

primer on litigation tactics, this holding is dubious at best, since we doubt that it ever pays for any litigant, public or private, to advance an unreasonable argument in an effort to bolster a reasonable one. More importantly, this ruling undermines the central objective of the EAJA -- to hold the government, if anything, to a higher standard than private parties by encouraging it at all times to refrain from taking unjustified positions. As the D.C. Circuit itself previously recognized in Spencer v. NLRB, 712 F.2d 539, 557 (D.C. Cir. 1983) (emphasis added), "government counsel [should be induced] to evaluate carefully each of the various claims they might make in a particular controversy, and to assert only those that are substantially

justified"; that approach will result in a "more sensitive and effectual promotion of the objectives of the EAJA."[3] Accord, Goldhaber v. Foley, supra, 698 F.2d at 197-98.

Furthermore, the Battles Farm holding imposes a substantial burden on small businesses confronted with an unjustified government position. Under the D.C. Circuit's ruling, if the private litigant raises a related claim as to which the government's defense is

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3. On the Battles Farm projects' suggestion for rehearing en banc, Judge Silberman attempted to reconcile his opinion with Spencer by drawing distinctions among claims, affirmative defenses, and other types of defenses. App. at 53a. We are baffled by this discussion. The purported distinctions misread Spencer, see 712 F.2d at 556-57, and have no logic under the statute.

reasonable, whether or not correct, he forgoes the award of any EAJA fees regardless of how little work he performs on the related claim and how successful he is overall in the suit. In this case, for example, the Battles Farm projects desperately needed operating subsidies and filed suit because HUD refused to pay them from the excess rental reserve fund despite numerous adverse court orders in other cases. It was entirely reasonable for the projects to add the contract claim to their complaint because it responded separately to HUD's argument that the agency could not pay subsidies from the reserve fund without obligating contract authority. There is no sound basis for penalizing the projects for having taken this action by a forfeiture of all fees,

especially when the contract claim was a subsidiary issue and the projects achieved extraordinary overall success in their suit.

3. The Solicitor General has stated that "EAJA litigation would be greatly simplified by the formulation of clear rules or presumptions that test the reasonableness of the government's position by reference to objective indicia." Underwood Petition at 9. This Court has provided exactly such criteria for assessing the impact on awards under various fee-shifting statutes of a party's failure to succeed on all issues and claims. Hensley v. Eckerhart, 461 U.S. 424 (1983). We urge

the Court to affirm the applicability of those criteria to the EAJA.[4]

In Hensley, the Court formulated three principles. First, a prevailing party is entitled to fees for all hours reasonably expended in producing a victorious result, even if "the plaintiff failed to prevail on every contention raised in the lawsuit," id. at 435, or to "receive all the relief requested." Id. at 436 n.11. The test is whether "the relief obtained justified [the total]

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4. Although Hensley arose under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, the Court stated that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.7. The EAJA, of course, is such a statute.

expenditure of attorney time." Id. at 436 n.11.

Second, the prevailing party is not entitled to fees for time expended on unsuccessful claims that are "distinct in all respects from his successful claims . . . ." Id. at 440. In that case, the "unrelated claims [must] be treated as if they had been raised in separate lawsuits" to implement "[t]he congressional intent to limit awards to prevailing parties . . . ." Id. at 434-35.

On the other hand, because the presentation of unrelated claims is likely to be the exception rather than the rule, Hensley lastly emphasizes that "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his

attorney's fee reduced simply because the district court did not adopt each contention raised." 461 U.S. at 440 (emphasis added).

> "It may well be that cases involving . . . unrelated claims are unlikely to arise with great frequency. . . . In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. . . .
>
> ". . . . Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Id. at 435 (emphasis added).

The district court below expressly followed Hensley in awarding fees to the Battles Farm projects (App. at 26a), and the reversal by the Court of Appeals is flatly inconsistent with

the principles adopted in that decision. An explicit holding by this Court that the district court properly applied Hensley would clarify litigation under the EAJA and serve the central statutory aims to deter and provide compensation for unreasonable government conduct.

4. The proper standard of review of "substantial justification" determinations under the EAJA also is an issue on which the circuits are in conflict. Compare, e.g., Underwood, supra, 761 F.2d at 1346 (abuse-of-discretion standard), with Dubose, supra, 761 F.2d at 917 (de novo review), and Spencer v. NLRB, supra, 712 F.2d at 563-64 (same). This conflict affects judicial review of virtually every EAJA case and thus merits the attention of this Court.

Moreover, the de novo standard followed by the court below to reverse a fee award is incorrect. It is critical to the effective functioning of the EAJA that small business concerns be able to rely on district court fee awards. The EAJA generally limits hourly fees to $75, see 28 U.S.C. § 2412(d)(2)(A), so that small business concerns are likely to lose money in defending against a fee appeal by the government. Indeed, the government maintains that the EAJA does not compensate litigants at all for time spent in opposing reasonable positions by the government on fee issues.[5] These limitations, coupled with the

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5. See, e.g., Cornella v. Schweiker, 741 F.2d 170 (8th Cir. 1984). But see, e.g., Cinciarelli v. Reagan, 729 F.2d 801, 809-10 (D.C. Cir. 1984).

government's superior resources, force private EAJA litigants constantly to reconsider the wisdom of prosecuting fee applications. By requiring these parties in effect to win twice -- once before the district judge who heard the case on the merits and then again before a circuit panel -- the de novo standard of review aggravates the difficulties in obtaining EAJA fees and thus tends to undermine the statute.

These considerations have particular force in this case. Here, the court of appeals not only scrutinized the district court fee award through the prism of de novo review, but also seized on a theory never before advanced by the government to overrule the trial judge. That upset the reasonable expectations of the Battles

Farm projects, not only, we submit, to their substantial detriment, but also to the detriment of the congressional purpose in enacting the EAJA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1987

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Housing and Urban Development was "substantially justified" in defending this lawsuit, in light of petitioners' novel claim of entitlement to long-term contracts under the now-defunct operating subsidy program, so that petitioners were not entitled to an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Discussion	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Co. v. *Wilderness Society*, 421 U.S. 240 (1975)	4
Battles Farms Co. v. *Pierce*, 703 F.2d 1292 (D.C. Cir. 1983)	2, 5, 6
Blackmon v. *United States*, 807 F.2d 70 (6th Cir. 1986)	11
Boudin v. *Thomas*, 732 F.2d 1107 (2d Cir. 1984)	12
Commissioners of Highways v. *United States*, 684 F.2d 443 (7th Cir. 1982)	12
Foster v. *Tourtellotte*, 704 F.2d 1109 (9th Cir. 1983)	13
Goldhaber v. *Foley*, 698 F.2d 193 (3d Cir. 1983)	10
Harris v. *Abrams*, 431 U.S. 928 (1977)	4
Harris v. *Ross*, 431 U.S. 928 (1977)	4
Hensley v. *Eckerhart*, 461 U.S. 424 (1983)	11
Hills v. *Underwood*, 429 U.S. 892 (1976)	4
Nichols v. *Pierce*, 740 F.2d 1249 (D.C. Cir. 1984)	11
Pierce v. *Underwood*, cert. granted, No. 86-1512 (May 18, 1987)	8
Russell v. *National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985)	12
Spencer v. *NLRB*, 712 F.2d 539 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984)	10, 12
Train v. *City of New York*, 420 U.S. 35 (1975)	3

Cases—Continued: Page

Trident Marine Construction, Inc. v. *District Engineer, United States Army Corps of Engineers*, 766 F.2d 974 (6th Cir. 1985) 12
Vibra-Tech Engineers, Inc. v .*United States*, 787 F.2d 1416 (10th Cir. 1986) 12
Wisniewski v. *United States*, 353 U.S. 901 (1957) .. 10

Statutes:

Equal Access to Justice Act:
28 U.S.C. 2412(d)(1)(A) 2, 6, 9
National Housing Act, Tit. II, 12 U.S.C. 1707 *et seq.*:
12 U.S.C. (1976 ed.) 1715z-1 2
12 U.S.C. (1976 ed.) 1715z-1(f)(3) 3
Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, Tit, II, § 201, 92 Stat. 2084 ..... 2, 3
12 U.S.C. 1715z-1(f)(3) 2
12 U.S.C. 1715z-1(g) 2
12 U.S.C. 1715z-1a 2

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 806 F.2d 1098. The opinion of the district court (Pet. App. 15a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1986. A petition for rehearing was denied on March 3, 1987 (Pet. App. 47a-49a), and the petition for a writ of certiorari was filed on April 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2412(d) provides in pertinent part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, * * * incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT

1. The history of this litigation is set forth in the court of appeals opinion (Pet. App. 3a-6a), and in the court's opinion on the merits in *Battles Farm Co.* v. *Pierce*, 703 F.2d 1292, 1293-1294 (D.C. Cir. 1983). Briefly, amendments made to the National Housing Act in 1974 authorized the Secretary to make "operating subsidy" payments[1] to owners of low-income housing projects to help them defray increased expenses (12 U.S.C. (1976 ed.) 1715z-1). The amendments contemplated two means by which the Secretary would make such payments. First, the Secretary was authorized to make subsidy payments from a "rental reserve fund," a fund consisting of excess rental charges remitted by project owners to

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[1] The operating subsidy program was restructured by Congress in 1977 and eliminated the following year. Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, Tit. II, § 201, 92 Stat. 2084 (12 U.S.C. 1715z-1(f)(3) and (g), 1715z-1a).

the Secretary. Second, the Secretary was authorized to enter into long-term contracts committing HUD to pay these subsidies for extended periods of time. 12 U.S.C. (1976 ed.) 1715z-1(f)(3).[2]

2. The instant action was brought in March 1976 by petitioners, project owners who sought to compel the Secretary to make operating subsidy payments. Petitioners made two interrelated claims. They sought subsidies out of the "rental reserve fund" retroactive to February 18, 1975, the date on which the operating subsidy program was to be in place. They also contended, based on the same statutory provision, that the Secretary was obligated to enter into long-term contracts pledging to continue operating subsidy payments for the 40-year life of the housing project.

In June 1976 the district court directed the Secretary to make operating subsidy payments to petitioners from February 18, 1975 forward, out of the rental reserve fund. Pet. App. 3a-4a; see 414 F. Supp. 521. The Secretary appealed from this holding.[3] The court refused, however, to order the Secretary to enter into long-term operating subsidy contracts with petitioners, and it also rejected their contention that they were entitled to retroactive sub-

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[2] Congress has provided the Secretary with "contract authority" for these programs. "Contract authority" is discussed in *Train* v. *City of New York*, 420 U.S. 35, 39 n.2 (1975). Briefly, the release of contract authority by Congress enables the Secretary to enter into commitments for the payment of federal funds up to a stated limit, prior to an appropriation of funds for the liquidation of such commitments.

[3] Since there was no stay, the Secretary commenced making current operating subsidy payments at the rate directed by the district court.

sidies based on the rents they would have charged if the operating subsidy program had been implemented in February 1975, rather than subsidies based on the lower rents petitioners actually charged. Petitioners cross-appealed from these holdings. The district court also denied petitioners' motion for attorneys' fees, relying on *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), because no statute at the time authorized such a fee award against the government.

Petitioners' lawsuit was consolidated for argument in the court of appeals with *Underwood* v. *Hills*, Nos. 76-1603 & 76-1650 (D.C. Cir.), a nationwide class action brought by tenants in eligible projects to compel the Secretary to implement the operating subsidy program.[4] After argument, the court of appeals ordered the cases held in abeyance upon this Court's grant of certiorari in *Harris* v. *Abrams*, 431 U.S. 928 (1977), and *Harris* v. *Ross*, 431 U.S. 928 (1977). This Court never decided *Abrams* and *Ross*, however, because the two cases were settled as part of a general settlement of the *Underwood* nationwide class action.[5] On March 22, 1982, this Court vacated

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[4] The district court's nationwide injunction in *Underwood* was stayed by this Court pending appeal. *Hills* v. *Underwood*, 429 U.S. 892 (1976).

[5] Pursuant to the *Underwood* settlement, the money in the rental reserve fund as of September 30, 1977, was set aside for payments to tenants in eligible projects, to compensate the tenants for the increased rents they had to bear in the absence of the operating subsidy program. Tenants who resided in these projects between February 1, 1975 and September 30, 1977 were reimbursed under the *Underwood* settlement. Petitioners' tenants were among those reimbursed pursuant to this settlement; petitioners themselves did not participate in or benefit from the settlement.

the court of appeals' judgment in *Abrams* and *Ross* and remanded the cases to the appropriate district courts for dismissal upon the parties' motion. 455 U.S. 1010.

The instant litigation remained dormant in the D.C. Circuit until February 1982, when the court of appeals requested a status report from the parties. In conjunction with his status report, the Secretary moved for supplemental briefing on the effect of post-1976 developments. On July 7, 1982, the court granted the Secretary's motion.

In their supplemental brief, petitioners maintained that they remained entitled to long-term contracts guaranteeing them operating subsidies for the life of their project mortgages, and that they were also entitled to retroactive subsidies for the period February 1975-May 1976. The Secretary resisted both propositions. He argued that the manner of implementation of the operating subsidy program (*e.g.*, whether by long- or short-term arrangements) had been left to his discretion, and that he had reasonably declined to enter into long-term contracts. The Secretary also argued that the *Underwood* settlement, which had reimbursed petitioners' tenants for their increased rents, had wiped out petitioners' claim of additional entitlement to retroactive subsidies. The Secretary thus took the position that petitioners had received everything to which they were entitled under the operating subsidy program. The Secretary did not press the argument—central to the pre-1982 phase of the litigation—that he had discretion not to implement this long-repealed program at all.

The court of appeals agreed with the Secretary's view of the long-term contract issue, pointing out that "[petitioners'] argument on this issue is weak" (703 F.2d at 1296). The court held, however, that

petitioners might be entitled to an award of retroactive subsidies based on the difference between the rents they actually charged and the rents they would have charged if the Secretary had implemented the program in February 1975 (703 F.2d at 1294-1297). The court remanded the case to the district court for a determination of the latter issue, which the parties then settled.

3. On April 21, 1983, petitioners moved for summary reversal of the district court's 1976 denial of attorneys' fees, claiming entitlement to fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, which became effective October 1, 1981. The Secretary opposed this motion and cross-moved for summary affirmance of the district court's denial of fees. The court of appeals vacated the district court's original holding on fees and remanded the case to the district court to determine whether petitioners could obtain an award of fees under EAJA. Pet. App. 5a n.6.

On remand, the district court held that the Secretary's position in the litigation was not "substantially justified," and that petitioners were therefore entitled to an award of attorneys' fees and paralegal expenses under EAJA. Pet. App. 15a-44a. The court relied chiefly upon the Secretary's decision to settle the *Underwood* litigation, and the Secretary's changed posture in the post-1981 phase of the litigation, to support its conclusion that the government's position was not "substantially justified." Pet. App. 22a-25a.

The court of appeals unanimously reversed (Pet. App. 1a-14a). With respect to the pre-1982 phase of this litigation, the panel held that petitioners' two claims—that implementation of the operating subsidy program was mandatory, and that petitioners were

entitled to long-term operating subsidy contracts—"were interrelated," so that the government could not have conceded the former issue without undermining its position on the latter. Pet. App. 8a-12a. The court noted that petitioners' two claims "turned in large part on the interpretation of the same statutory language" (*id.* at 9a), and that petitioner's long-term contract claim, which the government successfully resisted, "was far more costly and would have committed [HUD] to carry out the operating subsidy program for *four decades*, an awesome precedent" (*id.* at 10a (emphasis in original)). Because the court concluded that the interrelatedness of petitioners' claims justified the Secretary's defense of the entire pre-1982 phase of the lawsuit, the court found it "unnecessary to determine whether the government was separately justified in its litigating position on the rental reserve fund issue" (*id.* at 8a-9a).

The court also held that the Secretary's position in the post-1981 phase of the litigation was "substantially justified." The court noted that the government had prevailed on the long-term contract issue, the principal issue involved. And it held that the Secretary had acted reasonably in litigating the question of the appropriate method of calculating petitioners' retroactive subsidy. The court viewed the competing arguments on that issue as fairly balanced, and noted that the government had prevailed on that issue in the district court. Pet. App. 12a-14a. Because the government's position throughout the litigation was thus "substantially justified," the court reversed the judgment of the district court.

DISCUSSION

Petitioners contend that this case resembles *Pierce* v. *Underwood*, cert. granted, No. 86-1512 (May 18, 1987), and *Dubose* v. *Pierce*, petition for cert. pending, No. 85-516. In fact, the only things that the cases have in common is that they are EAJA cases that arose out of HUD's operating subsidy program. The legal questions that the instant case presents are altogether different from those presented in *Underwood*, and there is accordingly no need to hold this case pending disposition of that one. Nor is there any other reason for granting certiorari here.

1. In contrast to *Underwood* and virtually all the other operating subsidy cases, the instant case was brought by project owners, rather than tenants. This case was not subject to the nationwide settlement in *Underwood*; indeed, this litigation continued long after that settlement was concluded. Most importantly, this case involves a critical issue—the unique question of whether the Secretary was required to enter into long-term operating subsidy contracts—that is not present in *Underwood* and was not present in any of the other cases. It was this critical distinction that furnished the basis for the court of appeals' decision in the case at bar, a rationale that is markedly different from the rationale of the *Underwood* decision, and that focuses upon entirely different factors.[6]

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[6] In successfully opposing petitioners' motion requesting that this Court consider the instant petition together with *Underwood*, the *Underwood* respondents pointed out that the two petitions raise entirely distinct issues. See 86-1512 Opposition of *Underwood* Respondents to Motion of Battles Farm Petitioners For Consideration of Certiorari Petition With Related Cases.

The court of appeals below thus found it "unnecessary to determine" (Pet. App. 8a-9a) the answer to the main question presented in *Underwood*—whether the Secretary was "substantially justified" in declining to pay operating subsidies out of HUD's rental reserve fund—because petitioners' meritless position on the related "long-term contract" question made the Secretary's overall defense of this lawsuit reasonable. The court of appeals accordingly did not even consider the pivotal question in *Underwood*: the significance of the *Underwood* settlement, of this Court's antecedent grant of a stay, and of this Court's grant of certiorari in a pair of related cases. See Pet. App. 8a.[7] Thus, there is no reason to hold the instant case pending the disposition of *Underwood*.[8]

2. The court of appeals' decision in this case is both narrow and correct. As the court stated, "[w]e hold only that if a private plaintiff, in its complaint, combines one adventurous far-reaching claim with a more orthodox winning claim, and the two are inter-

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[7] Petitioners do not suggest that this case involves the second question presented in *Underwood*—the nature of the factors justifying a departure from the $75-per-hour cap on EAJA fees.

[8] Petitioners' selective quotation (Pet. 12) from our certiorari petition in *Underwood* is misleading. We did not suggest there that errors in EAJA litigation intrinsically warrant review by this Court, nor did we imply that the instant case is worthy of a grant of certiorari. Rather, we asserted only that "the errors committed by the [*Underwood*] court of appeals are of considerable practical significance and warrant review by this Court." 86-1512 Pet. 8. The reasoning of the court of appeals in this case is entirely different from the reasoning of the *Underwood* court, and, as noted at pages 9-11, *infra*, is correct.

twined, we must consider the justification of the government's *entire* litigating position before awarding attorneys fees." Pet. App. 12a (emphasis in original). This holding is eminently sound, and does not conflict with the decision of any other court of appeals.

Spencer v. *NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984), and *Goldhaber* v. *Foley*, 698 F.2d 193 (3d Cir. 1983), are not to the contrary.[9] The language from those opinions on which petitioners rely (Pet. 16-18) clearly shows that the courts were referring to cases involving wholly *discrete* claims, not a case—such as the instant case—where two claims are intertwined, and failure to defend against one claim could undermine the government's position on the other. In the instant case, petitioners argued below that their two claims were intertwined, and both the district court and the court of appeals agreed. See Pet. App. 9a, 10a. This fact-bound issue does not warrant review by this Court.

Moreover, contrary to petitioners' assertion (Pet. 16-20), the court of appeals did not hold that the government's "substantially justified" position with respect to one claim mandates denial of fees where the government's position with respect to another claim is not so justified. As we have noted, the court of appeals expressly declined to decide whether the Secretary's position on the rental reserve issue,

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[9] Even if the decision below were inconsistent with *Spencer* (see statement of Judge Wald on the denial of rehearing en banc, Pet. App. 50a-52a; but see statement of Judge Silberman to the opposite effect, Pet. App. 53a-54a), that inconsistency would be for the circuit court, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

viewed separately, was "substantially justified." Pet. App. 8a-9a. The court simply held that, where a claim the government successfully defeated was so intertwined with another claim that failure to contest the latter could jeopardize the defense of the former, the government was "substantially justified" in defending the entire case (Pet. App. 9a-11a). This is an eminently logical result.[10]

3. Petitioners' invocation of the principles set forth by this Court in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), is also wide of the mark. Contrary to petitioners' contention (Pet. 20-24), the principles articulated in *Hensley* do not necessarily apply in EAJA litigation. The EAJA, unlike the fee-shifting statute in *Hensley* and virtually all other fee-shifting statutes, authorizes fees not to any prevailing party, but only to a prevailing party where the government's position was not "substantially justified." Indeed, it is precisely the question of substantial justification that was before the court of appeals in this case. Thus, *Hensley*, which concerned only the standards to be applied in "cases in which Congress has authorized an award of fees to a 'prevailing party' " (461 U.S. at 433 n.7), is not apposite here. Cf. *Blackmon* v. *United States*, 807 F.2d 70, 73-74 (6th Cir. 1986) (analogy to fee-shifting decision not involving United States inappropriate, because of sovereign immunity considerations); *Nichols* v. *Pierce*, 740 F.2d 1249, 1258-1259 (D.C. Cir. 1984);

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[10] Petitioners' concerns about the supposed adverse effects of the opinion below are based at most on mere speculation that the opinion will be given the broad interpretation they adopt. If that speculation is correct, there will be ample opportunity for litigants to seek review in this Court in a case directly presenting the issue.

Commissioners of Highways v. *United States*, 684 F.2d 443, 444-445 (7th Cir. 1982).

4. Petitioners finally contend (Pet. 24-27) that review by this Court is warranted because the courts of appeals allegedly apply different standards of review to district court decisions in EAJA cases. Petitioners misapprehend the degree of unanimity among the courts of appeals on this subject. Every circuit other than the Ninth Circuit that has addressed the question has held that review of a district court's decision on substantial justification is *de novo* where (as here) the only issue is whether the government's case had a reasonable basis in law. See, *e.g.*, *Vibra-Tech Engineers, Inc.* v. *United States*, 787 F.2d 1416 (10th Cir. 1986); *Russell* v. *National Mediation Board*, 775 F.2d 1284 (5th Cir. 1985); *Trident Marine Construction, Inc.* v. *District Engineer, United States Army Corps of Engineers*, 766 F.2d 974, 980 (6th Cir. 1985); *Boudin* v. *Thomas*, 732 F.2d 1107, 1117 (2d Cir. 1984); *Spencer* v. *NLRB*, 712 F.2d at 563. While *Underwood* may indicate that the Ninth Circuit adheres at least formally to an "abuse of discretion" standard (761 F.2d at 1346), and perhaps should reconsider its isolated position on this point, that circuit's inconsistent position does not necessitate review by this Court of the D.C. Circuit's correct holding in the instant case.[11] In any event, the Ninth Circuit actually appears to apply *de novo* review when only an assessment of the strength of the government's legal arguments is involved. See

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[11] Moreover, contrary to petitioners' intimation (Pet. 26), the *de novo* standard does not necessarily favor the government. It also benefits a private party who appeals from an adverse district court decision on the question of whether the government's legal arguments were substantially justified.

Foster v. *Tourtellotte*, 704 F.2d 1109, 1112-1113 (9th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40370

Supreme Court, U.S.
FILED
JUN 2 1987
JOSEPH F. SPANIOL, JR
CLERK

No. 86-1661

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October Term 1986

BATTLES FARM COMPANY, et al.,

Petitioners,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

ARGUMENT 2

CONCLUSION 11

TABLE OF AUTHORITIES

PAGE

CASES:

Goldhaber v. Foley,
698 F.2d 193 (3d Cir. 1983)..... 4

Hensley v. Eckerhart
461 U.S. 424 (1983)..... 7

Spencer v. NLRB,
712 F.2d 539, cert. denied,
466 U.S. 936 (1984)..... 4,9

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REPLY BRIEF IN SUPPORT OF PETITION

Petitioners Battles Farm Company et al. respectfully submit this brief in reply to the opposition filed by the Solicitor General to the grant of their certiorari petition.

ARGUMENT

This case cries out for review by this Court.

I

Contrary to the Solicitor General's assertion (Opp. at 9), the court below most certainly did hold that "the government's 'substantially justified' position with respect to one claim mandates denial of fees where the government's position with respect to another [related] claim is not so justified." The district court ruled that the government's position on "the central issue" in this litigation -- whether HUD was required to pay operating subsidies from the excess rental reserve fund -- lacked substantial justification "because (1) HUD's position had no reasonable basis, (2) was consistently

rejected by the courts, and (3) was ultimately abandoned by HUD." App. at 21a. The court of appeals expressly did not decide that this ruling was erroneous (see App. at 8a-9a) and thus necessarily held that substantial justification on the contract theory immunized the government from legal fees under the EAJA regardless of the lack of substantial justification on the reserve fund theory.

It is difficult to imagine a decision more at odds with the congressional objectives in enacting the EAJA, especially when the reserve fund theory was the central issue in the case. The EAJA was adopted to deter the government from taking unreasonable positions. Yet the decision below affirmatively encourages the government to do exactly that, contrary to Spencer

v. NLRB, 712 F.2d 539, 556-57 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984), and Goldhaber v. Foley, 698 F.2d 193 (3d Cir. 1983).

The Solicitor General attempts to justify this perverse result on the sophistic notion that the government's position on the reserve fund claim somehow was necessary or appropriate to bolster a reasonable position on the contract claim. Apart from having no factual foundation whatever (see Pet. at 9-11), this argument makes no sense. Parties do not advance their cause on one issue by pursuing an unjustified position on another, and certainly the Congress that enacted the EAJA never could have intended to permit the government even to try.

Finally, the Solicitor General accuses us (Opp. at 8 n.) of "selective quotation" in suggesting that the same rationale on which the government sought certiorari in Underwood applies here. We stand by our suggestion, and submit that, if anything, this case warrants review more than Underwood. In Underwood the Solicitor General invites this Court to consider the justification for the government's position when it succeeds in obtaining certiorari and a stay from this Court on the very issue on which the lower courts have consistently ruled against it -- a circumstance that is likely to arise infrequently, if ever again. In contrast, we ask the Court to hear an issue that will arise every time related multiple issues are litigated -- a circumstance that probably is the norm and not the exception.

II

In this case, the courts found, and the parties now are in agreement, that the plaintiffs' reserve fund and contract claims were related in the sense that they constituted nonfractionable alternative requests for relief. In fact, to quote the district court, "much of counsel's time [was] devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." App. at 27a (internal quotations omitted).

In these circumstances, when the government, as here, takes an unreasonable position on one claim, but a reasonable position on another, by definition it is impossible to award fees according to an apportionment of counsel's time actually incurred on the

first claim. The only choice is either (1) to deny fees entirely, (2) to apportion fees on some mechanical formula, or (3) to award fees according to the overall results achieved on the claim against which the government unjustifiably defended. The court of appeals opted for the first choice, despite the fact that that vitiates the whole point of the EAJA. Following Hensley v. Eckerhart, 461 U.S. 424 (1983), the district court adopted the third. We submit that the district court was correct, and that this case merits review to settle the applicability of Hensley to EAJA awards.

III

The circuits undeniably are in conflict regarding the appropriate standard of review for "substantial

justification" issues. Indeed, the courts of appeals in Dubose and Battles Farm, applying the de novo standard of review, reversed the district court award of fees; the court of appeals in Underwood, applying the abuse of discretion standard, affirmed the fee award.

Furthermore, the de novo standard followed by the court below is calculated only to turn the award of fees under the EAJA into a lengthy, socially unproductive second litigation. More than that, it in practice defeats the objectives of the EAJA by forcing fee applicants to run a gauntlet of review that they cannot afford because of the limit on fee recovery. As explained in our petition (at 25-26), the EAJA generally limits hourly fees to $75.

Indeed, the government maintains that the EAJA does not compensate litigants at all for time spent in opposing reasonable positions by the government on fee issues. At any rate, by requiring parties in effect to win twice while they cannot possibly obtain full compensation for doing so, the de novo standard deters prosecution of valid EAJA applications.

The D.C. Circuit purports to justify the de novo standard on the ground that it will promote consistency of results under the statute. See Spencer v. NLRB, supra, 712 F.2d at 563-64. There is a greater need, however, for quick and final disposition of fee requests than for more uniformity in results. The issue under review, after all, is not whether the government erred in its position, a matter already

properly settled by the litigation on the merits. The issue instead is how badly it erred -- a question, we suggest, that the district judge may be in a better position than the court of appeals to assess and one, in any event, that does not merit a second, extended litigation and is adequately reviewed under an "abuse-of-discretion" test.

IV

At a minimum, if the Battles Farm certiorari petition is not granted now, this case should be held pending disposition of Underwood and Dubose. The Court already has granted certiorari in Underwood, which puts into question the meaning of the EAJA's "substantial justification" test. Moreover, Dubose also raises the same standard-of-review issue as Battles Farm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1987